RAILROAD COMMISSION OF TEXAS

OFFICE OF GENERAL COUNSEL

TEXAS SOUTHEASTERN GAS COMPANY'S REQUEST FOR A FORMAL HEARING ON ALLEGED VIOLATION NUMBER 6 OF AUDIT NUMBER 96-089	**§**	**DATE ISSUED: April 20, 2000**
	§	
	§	**GAS UTILITIES DOCKET NO. 8784**

PROPOSAL FOR DECISION

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RAILROAD COMMISSION OF TEXAS

TEXAS SOUTHEASTERN GAS	**§**
COMPANY'S REQUEST FOR A	**§**
FORMAL HEARING ON ALLEGED	**§GAS UTILITIES DOCKET NO. 8784**
VIOLATION NUMBER 6 OF	**§**
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I. Introduction

This case arises as the result of rate increases to four cities served by Texas Southeastern Gas Company (TSE). The cities are Bellville, Columbus, Waller and Sealy (Cities). These cities had city gate contracts with TSE and those contracts were amended in 1994, 1995, 1996 and 1997. At the time the changes occurred, TSE did not file revised tariffs with the Railroad Commission (RRC or Commission) reflecting those changes. The Audit Staff of the Gas Services Division (Staff or Division) conducted an audit in the summer of 1996 of all rates charged by TSE to its customers. The 1994, 1995, and 1996 contract amendments were a part of that audit. The Division notified TSE of its findings that the changes in the method of calculating rates had resulted in rate increases to the four cities and that TSE was required to file a Statement of Intent to Increase Rates (statement of intent). Further, Staff has requested that TSE refund to the Cities the difference between the amount actually charged and the amount that should have been charged. The refund period should cover any overcharge that occurred during the audit time frame and thereafter until proper rate approval is received.

The Examiners recommend that TSE be required to pay refunds for charges made in excess of the rates it was authorized to charge. The authorized rate for any utility is the rate as reflected in the valid tariffs on file with the Commission. Because the Examiners find that TSE charged unauthorized rates, i.e., rates in excess of those reflected in properly filed tariffs, the Examiners recommend that TSE refund $263,315 to the Cities. TSE should refund $85,692 to the city of Bellville, $82,103 to the city of Columbus, $44,234 to the city of Waller, and $51,286 to the city of Sealy. The also Examiners recommend that the Commission require TSE to charge Sealy and Waller the rate approved in *Complaint of the City of Sealy against Texas Southeastern Company*, G.U.D. No. 8752 and *Complaint of the City of Waller against Texas Southeastern Company*, G.U.D. No. 8754, respectively.[1] The Examiners recommend that TSE be required to file conforming tariffs for the cities of Sealy and Waller. Finally, the Examiners recommend that the Commission reject the tariffs filed in November 1996 for the cities of Bellville and Columbus and that TSE be directed to charge those cities the authorized rate of IFHSC-index plus 61.5¢, unless and until that rate is properly changed as required by GURA.

[1] *See*, Tex. RR. Comm'n, *Complaint of the City of Sealy against Texas Southeastern Company*, G.U.D. No. 8752 (Gas Utils.Div. April 13, 1999) (Final Order) and Comm'n, *Complaint of the City of Waller against Texas Southeastern Company*, G.U.D. No. 8754 (Gas Utils.Div. April 13, 1999) (Final Order).

II. Jurisdiction

The Commission has jurisdiction over these matters pursuant to TEX. UTIL. CODE ANN. §§ 102.001, et seq. (Vernon 1998 & Supp. 2000) and 16 TEX. ADMIN. CODE, Chapter 7 (1999).

III. Procedural History and Notice

The Gas Services Division conducted an audit in 1996 of all rates charged by TSE and issued a report on October 16, 1996 (hereinafter referred to as "October 1996 Audit" or "Audit No. 96-089"). In that report, the Division alleged that TSE raised its city gate rate to the four cities, on several occasions, without filing tariffs and schedules or a statement of intent as required by the Gas Utilities Regulatory Act, TEX. UTIL. CODE ANN. §§ 101.001-105.051 (West 1998 & Supp. 2000). (GURA). The Division also noted that TSE had failed to file tariff amendments for several other changes to the rates of various customers of TSE. TSE disagreed with the Gas Services Division and argued that, as a matter of law, TSE does not need to file a statement of intent when the sale is to a municipally-owned gas utility. By memo dated May 5, 1997, Edward Abrahamson, Assistant Director of Audit Section, Gas Services Division, forwarded to the Office of General Counsel TSE's request for a formal hearing. In that memo, Mr. Abrahamson stated, that "[t]he only point at issue is whether TSE must file a Statement of Intent to Increase Rates . . . when the sale is to a Municipally Owned Gas Utility." The case was docketed on May 6, 1997.

On July 18, 1998, the Cities of Brenham, Hempstead, Navasota, Sealy, Tomball, and Waller (Intervening Cities) filed a *Petition for Leave to Intervene*.[2] A *Motion to Strike* the intervention of the cities was denied and the *Petition for Leave to Intervene* was granted on August 21, 1997. On August 27, 1997, TSE filed a *Motion to Dismiss*. TSE argued in that motion that the Commission did not have jurisdiction to require that a statement of intent be filed by a gas utility when the sale is to a municipally-owned gas utility. On June 26, 1998, a Proposal for Decision (PFD) was issued in which the Examiner recommended that the *Motion to Dismiss* be denied and that TSE be ordered to prepare a statement of intent[3]. The Intervening Cities filed exceptions to the PFD on October 29, 1998, which also requested that a refund be provided for the amount charged in excess of the alleged legal rate.

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[2] The cities of Bellville and Columbus, which are also the subject of the October 1996 Audit, did not intervene.

[3] The case had been submitted to the Commission on stipulated facts.

The Commission first considered the *Motion to Dismiss* and the PFD on December 3, 1998. At that time, the Commission took the matter under advisement. On December 15, 1998, the Commission entered an order dismissing the case. The Cities filed a *Motion for Rehearing* which was granted on March 9, 1999.[4] The Commission stated in its order that "[a]n increase in rates for gas utility services charged by a gas utility to a municipally-owned gas utility and delivered at the city gate of such municipally-owned utility is an increase in rates subject to the statement of intent requirement of GURA."[5] Further, the Commission stated that, "[b]y neglecting to file statements of intent when it increased rates to the Cities of Bellville, Columbus, and Waller in June 1994, June 1995, and January 1996, and to the City of Sealy in July 1994, TSE failed to meet its statutory duty to file such statements of intent as required by Tex. Util. Code Ann. § 104.102."[6]

TSE filed a *Motion for Rehearing* on March 18, 1999. In that motion TSE reasserted its *Motion to Dismiss* and requested the Commission reinstate the order of December 15, 1999. In addition, TSE argued that there was no evidence in the record to support a finding that TSE had, in fact, increased its rates. The Examiner in the case recommended that the case be remanded for further proceedings to develop a record upon which a determination could be made as to whether TSE had increased its rates. On April 13, 1999, the Commission issued an order remanding the case for further proceedings. In that Order, the Commission stated that there was "insufficient evidence in the record to determine the amount of rate increases."[7] The case was remanded to the Examiner for further proceedings to determine the amount of increases, if any, of TSE's city gate rates and any other relevant factual matters.

The case was set for hearing at 10:00 a.m., Tuesday, November 30, 1999. The Notice of Hearing was sent to all the parties on November 12, 1999. The scope of the hearing, as delineated in the Notice, included the following issues:

1. whether TSE in fact increased its city gate rates to the Cities of Bellville, Columbus, Sealy, and Waller;

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[4] An order extending the time to rule on the *Motion for Rehearing* was entered on January 1, 1999.

[5] Order Requiring Statement of Intent, Conclusion of Law No. 2, p.3.

[6] Order Requiring Statement of Intent, Conclusion of Law No. 3, p.3.

[7] Order Remanding the Case for Further Proceedings, p. 1.

2. whether TSE should be ordered to pay refunds to the cities for any charges above the approved city gate rates and the amount of such refunds;

3. if TSE has in fact increased its city gate rates to the Cities, what procedures should be followed in its filing a statement of intent with respect to those rates; and,

4. any other matters that will aid in the disposition of this case.

Staff and TSE pre-filed testimony and presented evidence at the hearing. The cities of Sealy and Waller participated at the hearing by cross-examining the witnesses. Staff presented one witness, Edward Abrahamson, Assistant Director, Audit Section, Gas Services Division. The cities of Sealy and Waller did not present any witnesses. TSE presented three witness: Paul G. Doll, former Executive Vice President of TSE; Kirk Sprunger, Chief Financial Officer of the Yuma Companies, Inc. for TSE; and Lee Allen Everett, Consultant to TSE. Closing arguments and briefs were filed by Staff and the Intervening Cities on January 10, 2000. TSE filed its closing argument and brief on January 20, 2000. In addition, TSE filed a *Motion to Reopen the Record for Affidavit of Kirk Sprunger*. The motion was granted and TSE made Mr. Sprunger available for cross-examination on January 29, 2000. The record was closed on January 29, 2000.

IV. Disputed Issues

A. Summary of Issues

This case involves several issues. The first issue is a pure legal question regarding the Commission's jurisdiction: Does the Commission have jurisdiction to require a gas utility to file a statement of intent prior to increasing rates to a municipally-owned utility? The next several issues require the Commission to determine which rates TSE was authorized to charge its city gate customers, i.e, were the rates that TSE charged its city gate customers in 1994, 1995, 1996, 1997, and 1998 authorized rates? Finally, the Commission must decide whether or not TSE should be required to refund any amounts collected in excess of the authorized rate.

The analysis of the alleged rate changes, which are the subject of this case, can be divided into four chronological groups. The first group involves amendments to the contracts that occurred in June of 1994. The second group involves amendments to contracts that occurred in June of 1995. The third group involves amendments to contracts that occurred in June of 1996. Finally, the fourth group involves alleged changes in rates that occurred in the fall of 1997.

Except for the 1997 amendments, each contract period lasted twelve months. The first group of rate changes involves amendments to contracts between TSE and the cities of Bellville, Columbus, Waller, and Sealy. The cities of Bellville, Columbus, and Waller were involved in the second and third groups; the city of Sealy was not. Only the cities of Bellville and Columbus were involved in the fourth group. Schedule A summarizes the first three groups of rate changes, occurring in 1994, 1995, and 1996, which are the subject of the October 1996 Audit. The 1997 alleged overcharges were not a part of the original audit and are not included in this schedule.

Schedule A
Rate changes from 1994-1996 which are the subject of the October 1996 Audit

Cities	**Prior Rate**	**First Change 6/94-5/95**	**Second Change 6/95-5/96**	**Third Change 6/96-5/97**
Bellville	($Index_{AIP}$+.44)/MMBtu	***$2.85MMBtu***	***$2.55MMBtu***	***($Index_{IFHSC}$+.74)/MMBtu***
Columbus	($Index_{AIP}$+.44)/MMBtu	***$2.85/MMBtu***	***$2.60/MMBtu***	***($Index_{IFHSC}$+.74)/MMBtu***
Waller	($Index_{AIP}$+.44)/MMBtu	***$2.85/MMBtu***	***$2.55/MMBtu***	***($Index_{IFHSC}$+.74)/MMBtu***
Sealy	($Index_{EPI}$+.64)/MMBtu	***$2.75/MMBtu***		

A review of the pre-filed testimony and the testimony presented at the hearing reveals that all parties agree as to several undisputed facts: (1) that the rate in effect prior to the rate change of June of 1994 is the rate reflected in Schedule A as the "Prior Rate;" (2) that rate changes occurred in June of 1994, June of 1995, and June of 1996; (3) that the rate changes are those reflected in Schedule A; (4) that no tariffs, reflecting the revised rates, were filed at the time the rates were modified; (5) that the rate changes resulted in a higher cost to the cities for natural gas. The parties do not agree, however, as to whether the rate changes were authorized.

The Commission must determine whether or not the revised rates in 1994, 1995, 1996 and 1997 were authorized. The Examiners have concluded that, *as a matter of law*, the rate reflected in a valid tariff on file with the RRC is the rate authorized by law. Any rate higher or lower, is unauthorized. Any time that a rate decrease or rate equivalent is proposed, a utility must file a tariff with the Commission. Any time that a rate increase is proposed, a utility must file a statement of intent and must file the proposed revisions of tariffs and schedules. If the proposed increase is approved, the revised tariffs will be approved upon completion of the statement of intent process.

To determine whether TSE overcharged its customers, the rate charged by TSE must be compared to the valid tariff that was current at the time the rate change went into effect. A rate higher than the rate authorized by the tariff is an overcharge and refunds of any such overcharges should be required.

2. Discussion of Issues

Issue No. 1: Does the Commission have original jurisdiction over the sale of natural gas by a gas utility to a municipality.

Examiners' Recommendation: GURA provides that the sale of natural gas by a utility to a

municipality at the city gate is subject to the original jurisdiction of the Railroad Commission.

Since the issuance of Audit No. 96-089, TSE has argued that it is not required to file a statement of intent because the sale of natural gas by TSE to a municipality at the city gate is not subject to the original jurisdiction of the Railroad Commission. This legal issue has been the subject of much of the procedural history of this case and was briefed by the parties in the closing statements.

TSE's position regarding the Commission's jurisdiction was presented to Staff by letter dated November 15, 1996, re-asserted in its *Motion to Dismiss* filed on August 27, 1997, and advocated in a *Motion for Rehearing* filed on March 18, 1999. The Commission rejected this position on March 9, 1999, and ruled that the RRC had jurisdiction to require a statement of intent when a gas utility sells gas to a municipally-owned utility at the city gate. In remanding the case for further proceedings to determine the amount of increases, if any, of TSE's city gate rates and any other relevant factual matters, the Commission, by its action, indicated that it would assert its jurisdiction in this case.

On repeated occasions, TSE has argued that the language in the order indicating that all prior orders "are hereby vacated" was evidence of the Commission's intent to reconsider its position on the jurisdictional issues. TSE's argument ignores the actions of the Commission. By issuing its order remanding this case for further proceedings to determine the amount of increases, the Commission has unequivocally denied TSE's *Motion to Dismiss* and asserted jurisdiction. Nevertheless, in its *Closing Statement and Supporting Brief*, filed on January 20, 2000, TSE reasserts its jurisdictional arguments.

1. Staff's Position

Staff argues that the Commission has jurisdiction over the rates that TSE charges the Cities for city gate service and that the Commission's jurisdiction is not limited to the exclusive original jurisdiction of Section 102.001 of the GURA.[8] Instead, the Division argues that the Commission's jurisdiction is found both in the provisions of the Cox Act[9] and provisions of the GURA.[10]

Section 101.006, of the Texas Utilities Code (TUC) provides that GURA is applicable to gas utilities within the jurisdiction of the RRC and applies to all gas utilities, "including a gas utility that is under the jurisdiction, power, or authority of the railroad commission in accordance with a *law*

[8] Gas Services Division's Closing Statement and Supporting Brief (Gas Services Division Brief) at 7.

[9] TEX. UTIL. CODE ANN. §§ 121.001-121.158, previously TEX. REV. CIV. STAT. ANN. art. 6050-6066. In 1997 the provisions of GURA and the Cox Act were codified into the Texas Utilities Code. Utilities Act, 75th Leg., R.S. ch. 166, 1997 Tex. Gen. Laws 713. Section 10 of the Utilities Act indicated that no substantive changes in the law were intended by the Utilities Act. 1997 Tex. Gen. Laws at 1018. At the time of the codification, the provisions of the Cox Act were found at TEX. REV. CIV. STAT. ANN. arts. §§ 6050-6066 (Vernon 1962). Those provisions were codified into Sections 121.001-121.158 of the TUC.

[10] TEX. UTIL. CODE ANN. §§101.001-105.051, previously TEX. REV. CIV. STAT. ANN. art. 1446e.

other than this subtitle".[11] Staff argues that the Commission's jurisdiction over TSE's city gate sales rests within the Cox Act provisions, a law other than GURA.

The definition of "gas utility" contained in Section 121.001 of the TUC, containing a provision of the prior Cox Act, includes "a person who owns, manages, operates, leases, or controls within this state property or equipment or a pipeline, plant, facility . . . for transporting, conveying, distributing, or delivering natural gas for sale to municipalities."[12] The Cox Act provides that a gas utility is declared to be "affected with a public interest" and "is subject to the jurisdiction, control, and regulation" of the Commission.[13] Further, the Commission, after due notice, is provided with the authority to "establish, and enforce the adequate and reasonable price of gas and fair and reasonable rates of charges and rules for transporting, producing, distributing, buying, selling, and delivering gas."[14]

The Staff argues that the plain reading of the combined statutes, the Cox Act and GURA, both now codified in the Texas Utilities Code, evidences a legislative intent to charge the Commission with jurisdiction over city gate sales by gas utilities to municipally-owned utilities. In this case, TSE, a gas utility, supplies natural gas to the municipally-owned utility at the city gate. The Commission's jurisdiction over rates and services of gas utilities providing city gate service to municipally-owned utilities is established by the provisions of the Cox Act. Staff argues that it follows that the requirements of Section 104.102 apply to these rates and services.

In a prior Commission case, *Complaint Against Coronado Transmission Co.* (*Coronado*), the jurisdiction of the Commission over sales by a gas utility to a municipally-owned utility was at issue.[15] The Commission dismissed that case. Staff argues that the order of dismissal neither asserted nor implied that the Commission is without jurisdiction. Instead, it is Staff's position that the Commission concluded that there was no public interest which required the Commission to assume jurisdiction.

2. Intervening Cities' Position

The Intervening Cities argue that the plain language of the statute is unequivocal.[16] Section 104.102 of the TUC provides that a "gas utility may not increase its rates unless the utility files a

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[11] TEX. UTIL. CODE ANN. § 101.006, previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 2.01(c) (emphasis added).

[12] TEX. UTIL. CODE ANN. § 102.001(a), previously TEX. REV. CIV. STAT. ANN. art. 6050.

[13] TEX. UTIL. CODE ANN. § 121.051, previously TEX. REV. CIV. STAT. ANN. art. 6050 § 1.

[14] TEX. UTIL. CODE ANN. § 121.151, previously TEX. REV. CIV. STAT. ANN. art. 6053, § 1.

[15] Tex. R.R. Comm'n, *Complaint Against Coronado Transmission Company* (*Coronado*), Docket No. 8057 (Order of Dismissal, Feb. 7, 1994).

[16] Closing Statement of the Cities of Brenham, Hempstead, Navasota, Sealy, Tomball, and Waller (Intervening Cities Brief) at 1.

statement of intent . . . ." [17] In addition, the Intervening Cities concur with Staff's assessment of the *Coronado* case. The Cities also argue that the Commission has not determined that it lacks jurisdiction by virtue of the Commission's action in the *Coronado* case. In that case, the final order specifically and unequivocally declined to address the question of jurisdiction.[18] As a result, the Intervening Cities argue, the Commission's final order in *Coronado* did not establish any policy regarding the Commission's jurisdiction.

3. TSE's Position

TSE argues that the GURA and the Cox Act do not confer original jurisdiction on the Commission to review and revise contract prices between a municipal gas system and its supplier except upon a complaint that meets the standards of *High Plains Natural Gas Co., v. Railroad Comm'n*, 467 S.W.2d 532 (Tex.App.– Austin 1971, writ ref'd n.r.e.).[19] TSE's argument focuses on the language of Section 104.102: A statement of intent must be filed by a gas utility "with the regulatory authority that has *original* jurisdiction over those rates . . . ."[20] TSE argues that the basis for the Commission's jurisdiction must be found in the phrase "original jurisdiction over those rates."

TSE argues that GURA limits the Commission's original jurisdiction to the following: (1) sales by a gas utility to anyone outside the city limits; and (2) sales by a gas utility to "a gas utility that distributes gas to the public."[21] Since the sales in this case are wholesale, not retail sales, the Commission would have original jurisdiction only if each city is a "gas utility" that distributes gas to the public. However, Sections 101.003(7)(A) and 102.002 specifically exclude municipal corporations and municipally-owned utilities from the definition of "gas utility." TSE argues that this exclusion expressly limits the Commission's original jurisdiction in this case. TSE argues that the Cox Act cannot be relied upon to give the Commission original jurisdiction in all situations.

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[17] TEX. UTIL. CODE ANN. § 104.102, previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 5.08(a).

[18] Intervening Cities Brief at 2.

[19] Texas Southeastern Gas Company's Closing Statement and Supporting Brief (TSE Brief) at 5.

[20] TEX. UTIL. CODE ANN. § 104.102(a), previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 5.08(a) (emphasis added).

[21] TEX. UTIL. CODE ANN. § 102.001(a), previously TEX. REV. CIV. STAT. ANN. art. 6050.

TSE maintains that the Commission in *Coronado* considered, but did not adopt, Staff's position that a statement of intent and refunds should be required for city gate contract amendments that increase the utility's revenues.[22] TSE points out that the price formula changes in *Coronado* were clearly intended and expected to result in an increase in revenues and that the utility in that case did not file a statement of intent. Nevertheless, the Commission dismissed the case and, it is TSE's position, that the dismissal is a manifestation of the Commission's intent to establish a policy of not exercising jurisdiction in similar situations.

4. Examiners' Analysis and Recommendation

Pursuant to the provisions of the Texas Utilities Code, the Railroad Commission has two types of jurisdiction: original and appellate jurisdiction. Appellate jurisdiction, for example, provides the Commission with the authority to review rates set by a municipality's governing body or to require the filing of tariffs.[23] On the other hand, in order to require a statement of intent, the Commission must also have original jurisdiction.[24]

As pointed out above, this Commission has rejected TSE's position and has decided to exercise its original jurisdiction in this case. By issuing its order remanding this case for further proceedings to determine the amount of rate increases, the Commission asserted its intent to exercise its original jurisdiction over the sales which are the subject of this proceeding. The Commission's exercise of original jurisdiction over the rates charged to a municipally-owned utility is consistent with TUC Section 101.002 which states that the purpose of GURA is "to establish a comprehensive and adequate regulatory system for gas utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the utilities." [25]

A plain reading of TUC Section 104.102 reveals that a gas utility may not increase its rates unless the utility files a statement of intent with the regulatory authority that has original jurisdiction. Thus, a gas utility, desiring to increase its rates, must determine which regulatory authority has original jurisdiction to consider a statement of intent. The TUC provides that the Commission has "exclusive original jurisdiction" over the rates and services of a gas utility distributing natural gas or synthetic natural gas in areas outside a municipality.[26] The Commission also has exclusive original jurisdiction over "the rates and services of a gas utility that transmits, transports, delivers, or sells natural gas or synthetic natural gas to a gas utility that distributes gas to the public."[27] Municipalities, on the other hand, have "exclusive original jurisdiction over the rates, operations, and

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[22] TSE Brief at 4.

[23] TEX. UTIL. CODE ANN. §§ 102.152 & 103.051, previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 4.01.

[24] TEX. UTIL. CODE ANN. §§ 104.102, previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 5.08.

[25] TEX. UTIL. CODE ANN. § 101.002(a), previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 1.02.

[26] TEX. UTIL. CODE ANN. §§ 102.001 (a), previously TEX. REV. CIV. STAT. ANN. art 1446e, § 2.01(b).

[27] *Id.*

services of a gas utility within the municipality . . . ."[28]

In addition, Section 101.006 of the TUC also provides that the provisions of GURA relating to the Commission's jurisdiction are cumulative: "[GURA] is cumulative of laws existing on September 1, 1983, relating to the jurisdiction, power, or authority of the [Commission] over a gas utility, and, except as specifically in conflict with [GURA], that jurisdiction, power, and authority are not limited by [GURA]."[29] As currently codified, the provisions related to exclusive original jurisdiction of the Commission and municipalities are spread throughout Subtitle A, Title 3, of the TUC. As GURA was originally enacted, however, this provision was along side all other provisions related to jurisdiction. The provision is evidence of a legislative intent to preserve prior law relating to the jurisdiction of the Commission.

The concept of exclusive original jurisdiction existed prior to the enactment of GURA. In examining proposed regulatory reform prior to the enactment of the Public Utility Regulatory Act,[30] commentators noted that under the existing regulatory structure, the Commission had broad "original jurisdiction of utilities engaged in the intrastate transportation or sale of natural gas."[31] Prior to the enactment of PURA, municipalities had the power to regulate the rates of utilities operating within the limits of the town or city.[32] The Commission had appellate jurisdiction to review the rates set by a municipality within its corporate limits and the Commission had sole and original jurisdiction to fix city-gate rates for sales of gas by transmission pipeline companies to distribution systems.[33] Prior to the enactment of GURA, the Railroad Commission exercised its original jurisdiction to fix city-gate rates for sales by gas transmission pipeline companies to distribution systems. In *State v. Public Service Commission*,[34] a utility appealed an order of the Commission setting rates "at the city gate of *any towns* in Texas served by [the utility]."[35] The utility filed an action seeking a temporary and permanent injunction against the Commission from enforcing its order.[36] On appeal from a trial court ruling dismissing the case, the Austin Court of

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[28] TEX. UTIL. CODE ANN. § 103.001, previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 2.01(a). As originally enacted, GURA provided that a municipality had exclusive original jurisdiction within "its city or town limits."

[29] TEX. UTIL. CODE ANN. § 101.006(a), previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 2.01(c).

[30] Public Utility Regulatory Act, 64th Leg., R.S. ch. 721, 1975 Tex. Gen. Laws 2327.

[31] Richard C. Alsup, *Should the Texas Legislature Calm the Clamor for a State Utility Commission by Establishing One?*, 16 S. TEX. L. J. 127, 133 (1975).

[32] *See*, TEX. REV. CIV. STAT. ANN. art. § 1119 (1963 & Supp. 1973).

[33] Alsup, *supra* note 30; *See also*, Marshall Newcomb, *Some Aspects of Regulation of Public Utilities Operating in the State of Texas*, 5 BAYLOR L. REV. 335, 341 (1953).

[34] 88 S.W.2d 627 (Tex. App.–Austin, 1935, writ ref'd).

[35] *Id* (emphasis added).

[36] *Id* at 628.

Appeals held that the Commission had the jurisdiction to set those rates. Further, in reviewing the Cox Act, the Court held that "[a]uthority is also given the Commission to fix, establish, and enforce a reasonable rate which pipelines may charge for gas delivered at the city gate to another distribution company *or municipality* . . . ."[37] The Court concluded that the statutes conferred "exclusive authority, power, and jurisdiction upon the Commission to . . . fix city gate rates for gas sold and delivered by any gas pipeline utility at the city gate of any city or town in Texas."[38] There was no implied exemption of the Commission's original jurisdiction over transmission sales by a gas utility to a municipally- owned utility.

Section 101.006 of the TUC is a clear manifestation of the legislature's intent to preserve the Commission's original and appellate jurisdiction as it existed under prior law. The Commission's original and appellate jurisdiction was not modified by GURA, except, where it is inconsistent with the provisions of the GURA.[39] Commission jurisdiction over the rates charged to a municipally-owned utility is consistent with the purposes stated in TUC Section 101.002. TSE's proposed interpretation would create a fundamental change in the Commission's original jurisdiction as it existed prior to the passage of GURA. There is no prior law indicating that, under the Cox Act, the Commission did not have original jurisdiction over the sale of natural gas by a gas utility to a municipally-owned utility. TSE proposes that this Commission ignore the effect of Section 101.006. Further, the result of TSE's interpretation is inconsistent with the purposes of GURA.

A review of the legislative history of the origins of GURA is instructive. The original provisions of GURA were enacted as part of the PURA. A review of the legislative history reveals that, in enacting the regulatory provisions of PURA, the legislature intended to preserve the power of municipalities to regulate local utility service.[40] The legislature recognized, however, that municipalities could not effectively regulate state-wide or regional utilities.[41] PURA vested in statewide commissions the authority to regulate outside municipal limits, and attempted to balance the power of statewide commissions with the authority of municipalities within their corporate limits.[42] The balance was accomplished by providing municipalities with "original jurisdiction" over rates of utilities serving customers within its corporate limits.

Outside of the corporate limits, the Commission has original jurisdiction. Subsequent

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[37] *Id* at 629 (emphasis added).

[38] *Id* at 630.

[39] *See*, Robert A. Webb, *The 1975 Texas Public Utility Regulatory Act: Revolution or Reaffirmation?*, 13 HOUS. L.REV. 1, 16 (1975).

[40] Dan Pleitz and Robert Randolph Little, *Municipalities and the Public Utility Regulatory Act*, 28 BAYLOR L. REV. 977, 978 (1976).

[41] *Id*.

[42] *Id*. Pleitz and Little point to specific examples of regional utilities that were difficult to regulate on a purely local level: Southwestern Bell, Lone Star Gas Company, and Coastal States Gas Corporation.

legislative history is also instructive on this point. While testifying on H.B. 2090 (which amended an earlier version of TUC Section 104.003), Representative Jay Gibson was asked, "What's to keep you from making a contract very attractive to your large industries and business . . . at a much lower price and then the residential customers have to make that up in their rates?" Representative Gibson responded as follows:

> Well, I think when you have the rate-making process, the Railroad Commission looks at your whole system, how you're doing it . . . . The idea really when you're talking about having this reviewed by the Railroad Commission, you have a city for instance that's buying all this gas to distribute to the people within its jurisdiction. The rate-making authority looks at what you're selling the high volume customers, what you're selling to the cities and to everyone else in determining this rate.[43]

The fact that neither the question nor the answer attempts to limit the scope of the discussion to complaint proceedings is some indication that the Commission review initiated by a statement of intent to increase rates was intended to encompass even rates charged to a municipally-owned distribution utility.

Ultimately, it is the plain language and structure of the statute which should govern. Section 104.151 unequivocally states that a "utility *may not* increase its rates unless the utility files a statement of intent with the regulatory authority that has original jurisdiction. . . ."[44] To accept TSE's interpretation that the Commission does not have original jurisdiction over city-gate rates charged to municipally-owned utilities would lead to the conclusion that TSE could never increase its rates. For without a "regulatory authority" with which to file a statement of intent, a utility "may not increase rates." A result that could not have been intended by the legislature.

Issue No. 2. Did TSE charge unauthorized rates from June 1994 through May 1995?

Examiners' Recommendation: Yes, from June 1994 through May 1995, TSE charged the cities of Bellville, Columbus, Waller, and Sealy $191,631 in excess of the authorized rate.

1. Rates in effect before June 1994.

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[43] House Committee on Energy Resources, 67th Legislature, Hearings, March 31, 1981, Tape 1, Side B.

[44] TEX. UTIL. CODE ANN. § 104.102, previously TEX. REV. STAT. ANN. art 1446e § 5.08 (emphasis added).

The rates in effect prior to June 1994, as reflected in the contracts with the cities and the tariffs on file with the Commission, are undisputed. TSE testified that the cities of Bellville, Columbus, Waller, and Sealy originally entered into a contract with TSE on October 1, 1987.[45] The 1987 contracts provided for a complex series of price formula alternatives. All 1987 contract price formulas involved an Average Industrial Price (AIP) index published by Energy Planning, Inc. (EPI) plus 44¢/MMBtu, a survey spot index also published by EPI plus 44¢/MMBtu, and various comparisons between, and averages of, these two formulas.[46] In 1989, the contracts with Columbus and Waller were amended to provide a formula price of EPI's AIP Index plus 44¢.[47] Sealy amended its contract on March 13, 1991, to provide a formula price which was the lesser of the two EPI indexes plus 64¢.[48] Schedule B summarizes the rate that were in effect prior to 1994.[49]

Schedule B
Rates in effect prior to the June 1994 contract amendments.

Cities	**Rate in July 1994**
Bellville	(Index $_{AIP}$+ 0.44)/MMBtu
Columbus	(Index $_{AIP}$+ 0.44)/MMBtu
Waller	(Index $_{AIP}$+ 0.44)/MMBtu

[45] TSE Ex 1, 4-5.

[46] TSE Ex 1, 5:9-14. The AIP Marker index was intended to represent what industrial users in the Gulf Coast area pay, on average, for gas. This average may have been different from current market price. TSE Ex. 1, 11:10-14.

[47] TSE Ex. 1, 6:1-3.

[48] TSE Ex. 1, 6:8-9.

[49] Staff Ex. 1, 6:9-22, Staff Ex. 2, Tab 3, Exhibit EDA-3; TSE Ex. 1, 6:1-2; 11:10; 20:9 & 21:19.

Sealy	(Index $_{EIP\ or\ AIP}$+ 0.64)/MMBtu

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It is undisputed that these prices are the prices reflected in the tariffs filed by TSE on October 16, 1991, for the city of Sealy, and on May 23, 1990, for the cities of Waller, Bellville, and Columbus.[50] It is also undisputed that these rates were filed as current tariffs at the time of the October 1996 audit.[51]

b. The June 1994 Contract Amendments

The parties do not dispute that, in the summer of 1994, the contracts with the cities of Bellville, Columbus, Waller and Sealy were amended.[52] Under the amendment, the price for each successive year would be one of the following: a new fixed-price agreed to by the parties; a New York Mercantile Exchange (NYMEX) futures price plus cost of service at 74¢ per MMBtu; or a new index agreed to by the parties plus 74¢.[53] The Cities elected the fixed-rate option. Bellville, Columbus, and Waller chose to enter into a contract amendment providing for a one-year fixed price of $2.85.[54] Sealy entered into a similar amendment with a fixed price of $2.75, reflecting a larger volume.[55] None of the other city gate customers changed their rates at that time.[56] Schedule C summarizes the 1994 changes.

Schedule C
The June 1994 contract amendments.

Cities	**Prior Rate**	**Rate charged from 6/94-5/95**
Bellville	(Index $_{AIP}$+ 0.44)/MMBtu	$2.85/MMBtu
Columbus	(Index $_{AIP}$+ 0.44)/MMBtu	$2.85/MMBtu

[50] Staff Ex. 1, 6:9-22, Staff Ex. 2, Tab 3, Exhibit EDA-3; TSE Ex. 1, 6:1-2; 11:10; 20:9 & 21:19.

[51] Staff Ex. 1, 6:14-15.

[52] Staff Ex. 1, 6:23 & 7:1; TSE Ex. 1, 6:10-14; TSE Ex. 2 PGD 8, p. 33, PGD 9, p. 13, PGD 11, p. 10.

[53] TSE Ex. 1, 8:2-4. The NYMEX price is the price a seller will sell a contract of natural gas today in a specified future month. A buyer may lock in the price of natural gas in the future by purchasing a gas contract for delivery in a future month. TSE Ex. 1, 13:9-18.

[54] TSE Ex. 1, 8:1-2.

[55] Staff Ex. 1, 7:1.

[56] Staff Ex. 1, 7: 9.

Waller	(Index $_{AIP}$+ 0.44)/MMBtu	$2.85/MMBtu
Sealy	(Index $_{EIP\ or\ AIP}$+ 0.64)/MMBtu	$2.75/MMBtu

TSE did not file tariff amendments reflecting the new rates.[57]

3. Staff's Position

Staff argues that the rate TSE charged from June 1994 through May 1995 was not authorized because a statement of intent was not filed to increase the rates. The Railroad Commission was not notified of the change at the time that the amendments were made.[58] Tariffs were not filed with the Commission at the time rate changes went into effect.[59] The Division's witness testified that, had the tariffs been filed, they would have been filed with the Tariff Section of the Gas Services Division of the Railroad Commission.[60] The Tariff Section would have examined the tariff and would have compared the new rate coming in to the previous rate on file and would have determined whether the revised rate was a decrease, an equivalent rate, or an increase.[61] A tariff reflecting a *proposed increase* would have been rejected.[62] The Railroad Commission would issue a letter indicating that the tariff was rejected and that the tariff would be accepted as a statement of intent to increase rates.[63] However, because no tariff amendment was filed, the Gas Services Division did not become aware of the rate increase until the routine audit of October 1996.[64]

At the hearing, the Division witness described how the Gas Services Division reached the conclusion that rate increases had occurred. Three methods of comparing the previous rate with the new rate were applied.[65] Method 1 simply compared how the original rate provision actually performed compared to the flat/fixed rate.[66] The Division witness recognized that this method used

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[57] Staff Ex. 1, p. 9, ln 5-9.

[58] TR 92:10-22.

[59] Staff Ex. 1, 9:3-9.

[60] TR 93:8.

[61] TR 93:8-15.

[62] TR 93:15-17.

[63] TR93:15-21.

[64] TR 92:11-18.

[65] Staff Ex. 1, 10:10-20.

[66] *Id*.

hindsight based on the actual performance of the original index-driven rate.[67] Method 2 analyzed an historical rolling 12-month average of how the index had performed for the 12 months preceding the change, at the time TSE determined the new flat/fixed rate, and then compared it to the flat/fixed rate.[68] Method 3 analyzed the method used to determine the flat/fixed rate to see if it could be determined to be the locked-in equivalent to the original rate.[69] Methods 2 and 3 were applied, in part, to remove hindsight from a determination of whether or not a rate increase was intended. As described by the Division's witness, Methods 2 and 3 could have been used by the parties at the time they were considering the rate change.[70] The Division concluded that rate increases had occurred and that the increased rates required the filing of a statement of intent at the time the rate formula was changed. Therefore, the rate was unauthorized.

Once the Gas Services Division concluded that the revised rates were unauthorized, the Division evaluated the alleged overcharge. Staff compared the previous rate to the modified flat rate. From July 1994 through June 1995, the flat rate was higher than the rates reflected in TSE's tariffs on file with the RRC. From July 1994 through June 1995, the city of Sealy paid an estimated $51,286 dollars more than they would have paid if the city had been billed at the rate authorized in TSE's tariff.[71] In the same period, the city of Bellville paid an estimated $48,172 in excess of the rate authorized by the tariff; the city of Columbus and the city of Waller paid an estimated $51,163 and $41,010, respectively, in excess of the rate authorized by the tariff. Schedule D summarizes Division's analysis.

Schedule D
Estimated charges in excess of the authorized rate for rates charged from 6/94-5/95

Cities	**Authorized Rate in July 1994**	**Rate charged 6/94-5/95**	**Alleged overcharge**
Bellville	(Index $_{AIP}$+ 0.44)/MMBtu	$2.85/MMBtu	$48,172
Columbus	(Index $_{AIP}$+ 0.44)/MMBtu	$2.85/MMBtu	$51,163
Waller	(Index $_{AIP}$+ 0.44)/MMBtu	$2.85/MMBtu	$41,010
Sealy	(Index $_{EIP\ or\ AIP}$+ 0.64)/MMBtu	$2.75/MMBtu	$51,286
		TOTAL	$191,631

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] TR 18:16-20 & 42:1-5.

[71] Staff Ex. 2., tab 15.

4. Intervening Cities' Position

The Intervening Cities argue that the rates TSE charged were unauthorized rates from July 1994 through May 1995 because no statement of intent was filed. The cities of Sealy and Waller did not present any witness to challenge TSE's assertion that the rate changes were freely negotiated. The Intervening Cities' positions are identical with regard to the 1994 rate change and to the 1995 rate changes, which will be discussed below. The Intervening Cities challenged TSE's assertion by exploring the implications of evidence presented by TSE. In a letter sent by TSE to its municipal customers prior to the rate changes, TSE stated the following:

> The pricing of the existing contracts was put into place prior to the deregulation of the natural gas/transportation industry. This deregulation caused TSE's cost of gas to increase versus the index due to increased transportation costs and penalties for over and under-deliveries. The indices currently employed are not industry standards and TSE cannot buy gas at prices based on these indices.[72]

The Intervening Cities argue that this statement is evidence that TSE contemplated an increase in rates to the Cities, and revenue to itself, to cover the increase in its cost of gas.[73] Therefore, the Intervening Cities argue that, by TSE's own standards, TSE intended, proposed, and expected to increase its revenue.[74] Therefore, a statement of intent was required.

5. TSE's Position

TSE argues that the rates were authorized because, at the time the rates were changed, neither TSE nor the Cities intended a rate increase. As no rate increase was intended, a statement of intent was not required. TSE argues that the price change was a city-gate contract amendment freely negotiated with the city-owned distribution utility and approved by each city.[75] TSE presented evidence indicating that the contract amendments were not imposed by TSE as a unilateral act.[76] In fact, TSE explained that the Cities approached TSE requesting a fixed price option.[77] TSE clarified the rationale for the inquiry as follows: "[W]hile the basic approach of index pricing had in the past been advantageous to the cities due to declining gas prices, more recent volatility and increases in gas prices made fixed pricing worth consideration . . . ."[78] As explained by TSE to its customers,

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[72] TSE Exhibit 2, Tab 8, p. 6.

[73] Intervening Cities Brief at 4.

[74] *Id.*

[75] TSE Ex. 1, 2:13-14; 6:12-14.

[76] TSE Ex. 1, 6:15-19.

[77] TSE Ex. 1, 6:19-20 & 7:1-24

[78] TSE Ex. 1, 7:5-8.

the objective of fixed pricing is to prevent the customers from experiencing increases in price and volatility.[79]

TSE's witness testified that the utility arrived at a flat rate by examining the futures market, not the AIP index. The AIP index changed each month in response to past changes in the market price of gas.[80] TSE concluded that a flat rate should be based upon future projections.[81] NYMEX provided a forward-looking vehicle.[82] Based upon a historical comparison of both the NYMEX and the index-driven rate, TSE concluded that NYMEX plus 74¢ was equivalent, or less than, the index-driven rate.[83] TSE's witness testified that the utility developed a NYMEX-driven formula to arrive at a flat rate which was equivalent to the index-driven rate contained in its tariffs.[84] Projecting that formula into the future to derive a flat rate, TSE concluded that a flat rate of $2.85/MMBtu would be lower than both the NYMEX-driven rate and the index-driven rate contained in the existing contracts with the Cities and in the tariff.[85]

TSE's witness explained that these price changes were neither intended, nor expected to result in any increase in city-gate gas costs to the cities in question.[86] TSE presented evidence indicating that no net increase in revenues was expected.[87] TSE presented evidence indicating that its intent was to offer the cities an equivalent or lower rate, compared with the immediately preceding contract price formula.[88] The purpose of the fixed price was to protect the city against possible higher prices in the winter of 1994-1995.[89] TSE argues that Division's conclusion that the rate change resulted in an increase is based on hindsight.

In summary, TSE argues that the formula rate changes were authorized because they were not intended to be a rate increase. TSE does not argue that the method in calculating rates did not

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[79] TSE Ex. 1, 7:15.

[80] TSE Ex. 1, 11:9-18.

[81] TSE Ex. 1, 13-14.

[82] *Id.*

[83] TSE Ex. 1, 14:3-20.

[84] TSE Ex. 1, 15.

[85] *Id.*

[86] TR 146:10-12.

[87] TSE Ex. 1, 2:15-16.

[88] TSE Ex. 1, 10:10-14.

[89] TSE Ex. 1, 11:5-6.

change. TSE does not dispute that the different rate resulted in increased cost to the cities.[90] TSE does not dispute the fact that tariffs were not filed in 1994.[91] TSE argues that the changed rates were agreed to by the Cities and, although an increase was not intended, increased costs to the Cities were the result of warmer than expected weather conditions.[92] In fact, if it had been colder, the price TSE would have paid for gas would have gone up and the Cities would have experienced a benefit.[93]

Finally, the Examiners requested that TSE clarify why tariff amendments were not filed in 1994, 1995, and 1996 for the cities of Bellville, Columbus, Waller, and Sealy.[94] TSE's counsel pointed out that the correspondence in evidence in Exhibits PGD-8 through PGD-11 is replete with references to contract amendments or changes, but there is no discussion of tariffs.[95] Counsel for TSE stated that this reflects the fact that the tariff was not a critical document in the regulatory regime in which TSE operated.[96] TSE argues that the parties in interest documented their agreements in a timely fashion and in the manner most meaningful to them.[97]

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[90] TR133:22-25 and TR134:1-20.

[91] TSE Brief at 27.

[92] TSE Ex. 1, 2:17-19; TR 146:12-14.

[93] TR 146:15-17.

[94] Examiner's Letter No. 18.

[95] Texas Southeastern Gas Company's Response to Examiner's Letter No. 18 (TSE Response) at 3.

[96] *Id.*

[97] TSE Brief at 28.

6. Examiners' Analysis and *Recommendation*

Contrary to TSE's statement, the tariff *is* a critical document in the regulatory regime in which all gas utilities operate. Pursuant to TUC Section 102.151, every gas utility must file with each regulatory authority schedules showing all rates that are subject to the regulatory authority's original or appellate jurisdiction and in effect for a gas utility service, product, or commodity offered by the gas utility.[98] The tariff requirement is not unique to GURA.[99] Several courts have interpreted the legal significance of the tariff in the telecommunications context and in the context of electric utilities.[100] It is well settled that, unless a tariff is found to be unreasonable, filed tariffs govern a utility's relationship with its customers and the State, and have the force and effect of law until suspended or set aside. [101] The price reflected on the tariff is the authorized rate. Recently, the Texas Supreme Court analyzed tariff provisions in the context of limiting liability for damages. The Supreme Court noted a United States Supreme Court holding, stating that a utility could no more depart from the limitations of liability contained in the tariff "than it could depart from the *amount charged for the service rendered.*"[102]

Pursuant to 16 TEX. ADMIN. CODE § 7.44(c), each tariff filing shall be subject to review by the Gas Services Division. A rejected tariff may be accepted as a statement of intent or docketed on the Commission's own motion.[103] A gas utility may not directly or indirectly charge, demand, collect, or receive a greater or lesser compensation for a service provided or to be provided by the utility than the compensation prescribed by the applicable tariff.[104] Until a utility complies with all

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98 TEX. UTIL. CODE ANN. § 102.151, previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 4.06.

99 TEX. UTIL. CODE ANN. § 36.004 (Electric Utilities); TEX. UTIL. CODE ANN. § 52.251 (Telecommunications Utilities); and TEX. WATER CODE ANN. § 13.136 (Water and Sewer Utilities).

100 The following are recent telecommunication utility cases: *Kanuco Technology Corp. v. Worldcom Network Services, Inc.*, 979 S.W.2d 368, 371 (Tex. App.–Houston [14th Dist] 1998); *Southwestern Bell Telephone Company v. Metro-Link Telecom, Inc*., 919 S.W.2d 687, 691 (Tex. App.–Houston [14th Dist] 1996, writ denied); *Southwestern Bell Tel. Co. v. Vollmer*, 805 S.W.2d 825, 829 (Tex. App.–Corpus Christi 1991, writ denied); and, *Southwestern Bell Tel. Co. v. Nash*, 586 S.W.2d 326, 331 (Tex. Civ. App.–El Paso 1976, writ. ref'd n.r.e). The following are recent electric utility cases: *Henderson v. Central Power and Light*, 977 S.W.2d 439, 446 (Tex. App.–Corpus Christi 1998, writ den.) and *Auchan USA, Inc. v. Houston Lighting & Power Co.*, 961 S.W.2d 197, 201 (Tex. App.–Houston [1st Dist.] 1996) reversed on other grounds, *Houston Lighting & Power Co. v. Auchan*, 995 S.W.2d 668 (Tex. 1999).

101 *Kanuco Technology Corp. v. Worldcom Network Services, Inc.*, 979 S.W.2d at 371 (Tex. App.–Houston [14th Dist] 1998); *Auchan USA, Inc. v. Houston Lighting & Power Co.*, 961 S.W.2d 197, 201 (Tex. App.–Houston [1st Dist.] 1996) reversed on other grounds, *Houston Lighting & Power Co. v. Auchan*, 995 S.W.2d 668 (Tex. 1999); *Southwestern Bell Tel. Co. v. Nash*, 586 S.W.2d 326, 331 (Tex. Civ. App.–El Paso 1976, writ. ref'd n.r.e) (tariffs carry the dignity of statutory law); *Southwestern Bell Tel. Co. v. Vollmer*, 805 S.W.2d at 830 (Tex. App.–Corpus Christi 1991, writ denied) (tariff also represents the utility's "contract with the State").

102 *Houston Lighting & Power Co., v. Auchan*, 995 S.W.2d 668, 670 (Tex. 1999)(emphasis added).

103 16 TEX. ADMIN. CODE § 7.44(c).

104 TEX UTIL. CODE ANN § 104.005(a), previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 5.11.

regulatory procedures, it is prohibited from charging more than the legally established rate.[105]

TSE spent a great deal of effort at the hearing conveying what its intent was at the time of the formula rate change. This is evidence which presumably would have been presented to the Commission at the time a revised tariff was filed. Even if TSE's argument regarding the intent of the utility is accepted, in the context of TSE's argument, intent is relevant if the only reason that a rate is unauthorized is because the utility failed to file a statement of intent. In the case of the 1994 contract amendments, TSE was required to file a revised tariff *even if* the proposed rate was intended to be equivalent or lower than the prior rate. Therefore, intent is not relevant.

The Examiners have concluded that the critical issue regarding the June 1994 amendments is the fact that the rates charged were not first documented by a filed tariff. The intent of the proposed rate change is not relevant to the lawfulness of the rate charged. The revised rates were unauthorized because a revised tariff was not filed. Until a new tariff is filed and approved, the only authorized rates are the rates reflected in the tariffs in effect. Based on the analysis conducted by the Division, TSE charged the cities of Bellville, Columbus, Waller, and Sealy a total of $191,631 over the authorized rate.

Issue No. 3: Were the rates TSE charged from June 1995 through May 1996 unauthorized?

Examiners' Recommendation: Yes, from June 1995 through May 1996, TSE charged the cities of Bellville, Columbus, and Waller $3,217 in excess of the authorized rate.

[105] *Railroad Comm'n of Texas v. Moran Util. Co.*, 728 S.W.2d 764 (Tex. 1987).

It is undisputed that after 12 months the cities renegotiated their contracts with TSE. The cities and TSE evaluated the performance of the prior years and decided to revise the rates.[106] The revised rates for the cities of Bellville and Waller were $2.55/MMBtu.[107] The revised rate for Columbus was $2.60/MMBtu.[108] In 1995, Sealy rejected the fixed-price option and negotiated an agreement with TSE to return to the 1991 index.[109] It is also undisputed that in 1995 TSE did not file tariff amendments reflecting the revised rates. Schedule E provides a summary of the revised rates charged by TSE from June of 1995 through May of 1996.

Schedule E
The June 1995 contract amendments

Cities	**Authorized Rate in June 1995**	**Rates 6/94-5/95**	**Rate 6/95-5/96**
Bellville	(Index $_{AIP}$ + 0.44)/MMBtu	$2.85/MMBtu	$2.55/MMBtu
Columbus	(Index $_{AIP}$+ 0.44)/MMBtu	$2.85/MMBtu	$2.60/MMBtu
Waller	(Index $_{AIP}$+ 0.44)/MMBtu	$2.85/MMBtu	$2.55/MMBtu

a. Staff's Position

[106] TR 147:18-25 & 148:1-8.

[107] TSE Ex 1, 18:14-15 & 20:15.

[108] TSE Ex. 1, 23:5-13.

[109] TSE Ex. 1, 9:10-11.

As in the case of the June 1994 contract amendments, the RRC was not notified of the proposed contract amendment through a tariff filing.[110] The Commission did not have the opportunity to review the proposed rate change at the time the contracts were amended.[111] Instead, the RRC became aware of the formula rate change through the October 1996 Audit.[112] Applying Methods 1, 2, and 3, the Division concluded that rate increases had occurred.[113]

The Division compared the authorized rate to the new flat rate for the period from June 1995 through May 1996. The flat rate resulted in a decrease for the city of Bellville and an increase for the cities of Columbus and Waller. From June 1995 through May 1996, the city of Bellville saved an estimated $1,555.00.[114] In the same period, the city of Waller paid an estimated $31.00 in excess of the authorized rate, the city of Columbus paid an estimated $3,186.00 in excess of the authorized rate. Schedule F summarizes the Division's analysis.

Schedule F
Estimated charges in excess of the authorized rate for rates charged from 6/95-5/96

Cities	**Authorized Rate in June 1995**	**Rate charged 6/95-5/96**	**Alleged overcharge**
Bellville	(Index $_{AIP}$+ 0.44)/MMBtu	$2.55/MMBtu	($1,555) Savings
Columbus	(Index $_{AIP}$+ 0.44)/MMBtu	$2.60/MMBtu	$3,186
Waller	(Index $_{AIP}$+ 0.44)/MMBtu	$2.55/MMBtu	$31
		TOTAL	$3,217

b. TSE's Position

TSE's witness testified that the winter of 1994-95 was unusually warm, the mildest in 100 years.[115] The unusually warm winter contributed to an unanticipated drop in prices.[116] The

[110] TR 92: 10-22.

[111] Staff Ex. 1, 9:3-9.

[112] TR 92:11-18.

[113] Staff Ex. 1, 10:10-20.

[114] Staff Ex. 2., tab 16.

[115] TSE Ex. 1, 8:9-11.

[116] *Id.*

advantages of the fixed price had not been realized.[117] The cities had the option of negotiating a new fixed price or reverting to an index-driven alternative.[118] Bellville, Columbus, and Waller chose to renegotiate a new lower flat rate.[119]

As in the case of the June 1994 contract amendments, TSE does not argue that the methods of calculating rates changed. Unlike the June 1994 amendments, however, TSE disputes that the June 1995 amendments resulted in rate increases. In addition, TSE argues that the changed rates were not intended to be rate increases. TSE reached this conclusion by comparing the revised flat rate to the June 1994 contract amendments. In each case, the revised flat rate was lower than the June 1994 flat rate. In addition, TSE concluded that the revised flat rate was lower than the rate produced by applying the NYMEX formula, developed in the June 1994 contract amendment discussed above, which TSE assumed was valid.[120] TSE presumed that both rate options, the flat rate and the NYMEX-Index driven rate, contained in the June 1994 contract were authorized; TSE also assumed that a change to a lower rate than the June 1994 rate would also be authorized.

c. Examiners' Analysis and Recommendation

As in the case of the June 1994 amendments, the authorized rate is the rate as reflected in the current tariff. The relevant point of comparison is not the June 1994 contract amendment. The relevant point of comparison is the authorized rate as reflected in the tariffs on file with the Commission at the time of the June 1995 contract amendments. As in the case of the June 1994 amendment discussed above, TSE was required to file a revised tariff with the RRC when the contracts were revised. By failing to file a tariff amendment, TSE was charging an unauthorized rate. Although Bellville experienced a lower rate than the authorized rate and there no overcharge resulted, the rate charged was also unauthorized because TSE failed to file a tariff. TSE overcharged the cities of Waller and Columbus $3,217.

Issue No. 4: Were the rates TSE charged from June 1996 through May 1997 unauthorized?

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[117] TSE Ex. 1, 8:16.

[118] TSE Ex. 1, 18:14-20; 20:6-17; and 23:5-14.

[119] *Id.*

[120] TSE Ex. 1, 18:14-20; 20:6-17; and 23:5-14.

Examiners' Recommendation: **Yes, from June 1996 through May 1997, TSE charged the cities of Bellville, Columbus, and Waller $26,347 in excess of the authorized rate.**

It is undisputed that after 12 months the cities of Belleville, Columbus, and Waller again renegotiated their contracts with TSE. TSE and the cities agreed to an index-driven price.[121] Schedule G provides a summary of the rate changes in effect June of 1996. The parties do not dispute that the rates shown for June 1996 through May 1997 are the rates that went into effect for these three cities. Furthermore, all parties agree that the basis of the AIP index, which was the basis of the authorized rate, ceased being published in December of 1995.

Schedule G
The June 1996 contract amendments

Cities	**Authorized Rate in June 1996**	**First Change 6/94-5/95**	**Second Change 6/95-5/96**	**Third Change 6/96-5/97**
Bellville	($Index_{AIP}$+.44)/MMBtu	***$2.85MMBtu***	***$2.55MMBtu***	***($Index_{IFHSC}$+.74)/MMBtu***
Columbus	($Index_{AIP}$+.44)/MMBtu	***$2.85/MMBtu***	***$2.60/MMBtu***	***($Index_{IFHSC}$+.74)/MMBtu***
Waller	($Index_{AIP}$+.44)/MMBtu	***$2.85/MMBtu***	***$2.55/MMBtu***	***($Index_{IFHSC}$+.74)/MMBtu***
Sealy	($Index_{EPI}$+.64)/MMBtu	*$2.75/MMBtu*		

a. Staff's Position

The Division's witness testified that the rate increases that took effect on June 1, 1996 were the result of the termination of indexes published by Energy Planning, Inc.[122] As a consequence, TSE had to move to a different index.[123] All thirteen of TSE's city-gate rates were changed.[124] As noted in the October 1996 Audit, of TSE's thirteen city-gate customers, only one filed tariff was accurate at the time of the audit.[125] During the audit time frame, TSE renegotiated all city-gate contracts.[126] TSE had filed no tariff amendments for any contractual rate changes. In addition, the

[121] TSE Ex. 1, 19:5-6; 21:4-9; and 23:18-20.

[122] Staff Ex. 1, 6:18-22.

[123] *Id.*

[124] Staff Ex. 2, Tab 1 at 22. TSE's thirteen customers during the audit period are as follows: Bay City Gas Co., city of Bellville, city of Brenham, city of Columbus, Entex, Inc., city of Hempstead, city of Navasota, city of Sealy, city of Tomball, city of Waller, city of Waller at the Praire View town meter, Capital Gas Distribution, Inc., Texas Gas Distributors.

[125] Staff Ex. 2, Tab 1, p. 4.

audit report noted TSE's failure to file a tariff as a recurring violation. In the prior audit, which began October of 1993, Audit No. 94-015, the Gas Services Division noted that TSE had failed to file all required tariff amendments.[127]

The Division concluded that several of the changes resulted in an equivalent rate or a lower rate: Bay City Gas, Co., City of Brenham, Entex, Inc., City of Hempstead, City of Navasota, City of Tomball, Capital Gas Distribution, Inc., and Texas Gas Distributors.[128] The Division determined, however, that the rate changes placed into effect for the cities of Bellville, Columbus, and Waller, resulted in rate increases.[129]

The cities of Brenham, Hempstead, and Navasota went from AIP index-driven rate to an "Inside FERC Houston Ship Channel/Beaumont, Texas" (IFHSC) index plus 52.5¢.[130] In June of 1994, these cities had a rate different from the rates in effect for the cities of Bellville, Columbus, and Waller.[131] The city of Tomball, Entex, and Texas Gas Distribution, however, had the same rate in June of 1994 as cities of Bellville, Columbus, and Waller. That rate was an AIP Index plus 44¢ per MMBtu ((Index$_{AIP}$ + $.44)/MMBtu).[132] In 1996, Tomball, Entex, and Texas Gas Distribution changed to an IFHSC index plus 61.5¢ per MMBtu ((Index$_{IFHSC}$ +$.615)/MMBtu). The Gas Services Division considered those rates to be equivalent to the AIP index-driven rate of (Index$_{AIP}$ + $.44)/MMBtu. However, the Cities of Bellville, Columbus, and Waller went from an AIP index-driven rate to an IFHSC index plus 74¢, i.e.(Index$_{IFHSC}$ +$.74)/MMBtu. Staff considered that to be a rate increase of 12.5¢ per MMBtu.[133]

Staff concluded that TSE intended a rate increase to the cities of Bellville, Columbus, and Waller by comparing the contract amendments to those cities with the amendments that TSE made with the city of Tomball, Entex., Inc. and Texas Gas Distributors. Schedule H is a summary of Staff's findings.

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[126] Staff Ex. 2, Tab 1, p. 5.

[127] Staff Ex. 2, Tab 1, at 2.

[128] *Id*.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Staff Ex. 1, 8:7-16.

[133] Staff Ex. 1, 8:16-17.

Schedule H
Summary of 1996 contract amendment with six TSE customers.

City	Rate authorized in tariff	June 1996 Contract Amendment
Bellville	(Index $_{AIP}$+ 0.44)/MMBtu	(Index$_{IFHSC}$+.74)/MMBtu
Columbus	(Index $_{AIP}$+ 0.44)/MMBtu	(Index$_{IFHSC}$+.74)/MMBtu
Waller	(Index $_{AIP}$+ 0.44)/MMBtu	(Index$_{IFHSC}$+.74)/MMBtu
Entex, Inc.	(Index $_{AIP}$+ 0.44)/MMBtu	(Index$_{IFHSC}$+.615)/MMBtu
City of Tomball	(Index $_{AIP}$+ 0.44)/MMBtu	(Index$_{IFHSC}$+.615)/MMBtu
Texas Gas Distributors	(Index $_{AIP}$+ 0.44)/MMBtu	(Index$_{IFHSC}$+.615)/MMBtu

Staff noted that even though the city of Tomball, Entex, Inc., and Texas Gas Distributors had the same authorized rate, the revised rates for the cities of Bellville, Columbus, and Waller were higher. Therefore, Staff concluded, that TSE must have intended a rate increase.[134] Furthermore, when Paul G. Doll (former Executive Vice President of TSE) sent a letter to Entex, Inc., Mr. Doll noted that the IFHSC index plus 61.5¢ was equivalent to the AIP index-driven rate plus 44¢. Mr. Doll included a schedule that compared the IFHSC index and the AIP index from February of 1991 through December of 1995.[135] In order to achieve an IFHSC index-driven rate that was equivalent to (Index $_{AIP}$+ 0.44)/MMBtu, TSE concluded that an additional 17.5¢ would have to be added to the rate formula. In the case of Bellville, Columbus, and Waller TSE added a further 12.5¢ in addition to the 17.5¢ for a total of 30¢, making the total-add on 74¢.

Since the AIP index which was the basis of the TSE rate reflected in the tariff was no longer in effect, the Staff compared the rates adopted for Bellville, Columbus, and Waller to an equivalent rate.[136] Staff concluded that the IFHSC plus 61.5¢ rate was equivalent to the AIP index-driven rate. The Division introduced evidence comparing the rates charged to the cities of Belleville, Columbus and Waller to the rate of IFHSC plus 61.5¢. From June 1996 through May 1997, the city of Bellville was overcharged $10,001.[137] In the same period, the city of Waller paid an estimated $3,193 in excess of the authorized rate, and the city of Columbus paid an estimated $13,180 in excess of the authorized rate. Schedule I summarizes Division's analysis.

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134 Staff Ex. 1, 19:3-9.

135 Staff Ex. 2, Tab 4, p. 11.

136 The AIP Marker index ceased to be published effective December 1995. Staff Ex. 1, 7:9-10.

137 Staff Ex. 2., tab 16.

Schedule I

Estimated charges in excess of the authorized rate for rates charged from 6/96-5/97

Cities	**Authorized Rate in July 1994**	**Rate charged 6/96-5/97**	**Alleged overcharge**
Bellville	(Index $_{AIP}$ + 0.44)/MMBtu	*(Index$_{IFHSC}$+.74)/MMBtu*	$10,001
Columbus	(Index $_{AIP}$+ 0.44)/MMBtu	*(Index$_{IFHSC}$+.74)/MMBtu*	$13,180
Waller	(Index $_{AIP}$ + 0.44)/MMBtu	*(Index$_{IFHSC}$+.74)/MMBtu*	$3,193
		TOTAL	$26,374

2. TSE's Position

TSE's witness testified that, under both the June 1994 and June 1995 contract amendment, the price for each successive year would be a new fixed price agreed to by the parities, a NYMEX-futures price plus cost of service at 74¢ per MMBtu, or a new index agreed to by the parties plus 74¢.[138] In June of 1996, the cities of Bellville, Columbus and Waller expressed an interest in using an index other than NYMEX. TSE was willing to use the IFHSC index as a substitute for NYMEX.[139] TSE's witness testified that the IFHSC Index would yield a lower rate than the NYMEX-driven rate. TSE conveyed its analysis to the cities.[140] As discussed in the context of the June 1994 amendment above, TSE considered the NYMEX-driven rate to be an authorized rate. Therefore, TSE concluded that the selection of an index which would yield a lower rate would not be a rate increase.[141] Thus, TSE argues that a rate increase was not intended. Finally, TSE, in response to an inquiry from the Examiners, established that although TSE did not file a revised tariff at the time of the proposed rate change, TSE subsequently filed a tariff in November of 1996.[142]

3. Examiners' Analysis and Recommendation

As with the 1995 contract amendments the relevant point of comparison is not the prior unauthorized rate. Computation of any potential overcharge, however, is complicated by the fact that the AIP Index, which was the underlying basis of the authorized rate was no longer published. As shown by Staff's testimony, and TSE's own computations, IFHSC plus 61.5¢ was equivalent to the prior authorized AIP index-driven rate. The Commission should adopt Staff's recommendation that IFHSC plus 61.5¢ was an equivalent rate to the authorized rate in TSE's tariff. Between June of

138 TSE Ex. 1, 8:2-4 &19:7-20.

139 *Id*.

140 TSE Ex. 2, Tab 8 at 41.

141 TSE Ex. 1, 20:3-4; 21:4-12: and 23:18-20.

142 Examiners' Exhibits 1, 2, 3, & 4.

1996 and November of 1996, the authorized rate would be this equivalent index-driven rate.

As noted by TSE, a tariff was filed in November of 1996. It is apparent that the tariff was filed after the October 1996 Audit was completed. That tariff reflected a rate of IFHSC plus 74¢. However, the rate reflected on that tariff was an increase over the prior authorized rate. Consequently, the Commission must determine whether or not a statement of intent was required to be filed in addition to the revised tariff. TSE's argument that it did not intend a rate increase is based upon the incorrect assumption that the June 1995 rate was authorized. However, it was greater than a rate formula which was equivalent to the authorized rate formula. Consequently, the rate reflected in the revised tariff is a proposed increase over the prior authorized rate and a statement of intent was required.

The Commission should not adopt TSE's argument that a utility's intent is relevant to the determination of whether or not a statement of intent should be filed in *this* case. Whether or not a utility's intent is relevant cannot, and should not, be assessed in a case in which the utility has not complied with the minimum regulatory requirements.[143] In the case of the 1994, 1995, and 1996 amendments, TSE did not comply with all of the regulatory requirements. If TSE had filed a tariff, the purpose and intent of the proposed rate formula change would undoubtedly have been evaluated. TSE would have been advised of Staff's conclusions. The filing of a tariff in November of 1996 does not cure the previous violations. In the case of the 1996 contract amendment, regardless of TSE's stated intent in this case, the revised tariffs reflect a rate which is a "proposed increase" over the prior authorized rate. Therefore, in 1996, not only was TSE required to file a tariff, TSE was also required to file a statement of intent and it did not do so.

In summary, the Commission should find that IFHSC plus 61.5¢ is equivalent to the rates reflected on TSE tariffs on file with the Commission prior to November 1996. The Commission should reject the tariffs that were filed in November 1996 because they were a proposed increase over the prior authorized rate. Finally, the Examiners recommend that the Commission find that TSE overcharged the cities of Bellville, Columbus, and Waller $26,374 dollars from June 1996 through May 1997.

Issue No. 5: Were the rates TSE charged from June 1997 through May 1998 unauthorized?

Examiners' Recommendation: Yes, from June 1997 through May 1998, TSE charged the cities of Bellville, and Columbus $43,648 in excess of the authorized rate.

a. Position of the Parties

The Division's witness testified that, while the October 1996 Audit was reviewed with TSE on August 28, 1996, and the audit time frame ended in 1996, additional billing information was

[143] Furthermore, TSE argues that, in a case where intent is analyzed, the utility must demonstrate that the party's expectations were reasonable in light of the facts existing at the time the rate change was made. TSE Brief at 17; TSE Ex. 2, 13:12-14. Incorrect assumptions about the correct legal standard cannot be considered reasonable.

gathered and reviewed by Staff for billing through May of 1998.[144] The Division's witness testified that TSE continued charging the cities of Bellville and Columbus an IFHSC plus 74¢ rate after June of 1997. The Division's witness testified, however, that TSE changed the rate to the city of Bellville in December 1997 and that TSE changed the rate to the city of Columbus in October of 1997.[145] The Division compared the rates charged to the authorized rate and the Division's witness introduced a schedule describing his findings regarding those rates.[146] The Division alleged that the rates charged from June 1997 through May 1998 resulted in overcharges to the cities of Bellville and Columbus of $43,648. TSE did not challenge the Division's findings.

2. Examiners' Analysis and Recommendations.

TSE charged the cities of Bellville and Columbus $43,648 in excess of the authorized rate from June of 1997 through May of 1998 because TSE continued billing rates in excess of the authorized rate. As noted in the discussion regarding the June 1996 through May 1997 rates, Issue No. 4 above, TSE filed revised tariffs on November of 1996. The tariff reflected a rate increase over the authorized rate. TSE did not file a statement of intent. Until a statement of intent is filed and approved, the rates charged by TSE are unauthorized. In addition, Staff testified that the rates changed and no tariffs were filed reflecting that change. Until a statement of intent is filed and a new tariff is approved, the authorized rate is IFHSC plus 61.5¢. Any rates charged in excess of that amount are unauthorized.

Issue No. 6: Should a statement of intent and/or refunds be required.

Examiners' Recommendation: **Yes, TSE should refund to the Cities the amounts charged in excess of the authorized rates as follows: City of Bellville, $85,692; city of Columbus, $82,103; city of Sealy, $51,286; and city of Waller, $44,234. The authorized rate is the rate reflected on the current valid tariff, which is IFHSC plus 61.5¢. TSE should be ordered to charge the authorized rate until a new rate is approved by the Commission.**

1. Position of the Parties

Staff and the Intervening Cities argue that TSE should be required to file a statement of intent because the rate changes in 1994, 1995, 1996, and 1997 resulted in rate increases and a statement of intent was not filed. Staff and the Intervening Cities argue that TSE intended the rate increase and that, regardless of the intent, a formula rate change that results in a rate increase requires the filing of a statement of intent. Until a statement of intent is filed, any rates charged that differ from the

[144] Staff Ex. 1, 20:17-23 & 21:1-12.

[145] Staff Ex. 1, 21:5-6.

[146] Staff Ex. 2, Tab 16 & 17.

authorized rate is illegal

TSE argues that it should not be required to file a "retroactive" statement of intent because it never intended to implement a rate increase. TSE argues that a retroactive statement of intent is poor public policy.[147] Further, TSE argues that requiring refunds in this case amounts to a penalty. TSE's witnesses testified that it did not experience a windfall because TSE purchased the gas for the Cities at NYMEX market prices when the Cities elected fixed prices.[148] Finally, TSE's chief financial officer testified that the proposed refunds in this docket were larger than TSE's net earnings in 1998.[149]

2. Examiners' Recommendation and Analysis

The statement of intent process is a prospective process.[150] All of the requirements relate to a prospective change. For example, the utility must provide notice of a prospective rate increase and the proposed effect.[151] There is no statutory guidance that governs a retroactive filing of a statement of intent. Staff, however, is not arguing that a retroactive statement of intent should be filed. Staff has requested that TSE should refund to the Cities the difference, with interest, between the amount actually charged the Cities by TSE during the Audit Period and thereafter, until proper rate approval is received, and the amount that should have been charged.[152]

By claiming that TSE did not intend a rate increase, TSE brings into sharp relief the importance of the provisions of TEX. UTIL. CODE ANN. § 102.151 and 16 TEX. ADMIN. CODE § 7.44(c) relating to tariffs. The regulations require that a tariff must be filed whenever a rate change is made. If TSE had complied with these provision, TSE would not have spent a considerable portion of the hearing in this case conveying what its intent was in 1994, 1995, and 1996. TSE would have taken that up with the Commission at the time of the rate change.

More importantly, the tariff represents the rates that a utility is authorized to charge. Charging an unauthorized rate is illegal. Until a utility complies with regulatory procedures, it is prohibited from charging more than the legally established rate.[153] In *Railroad Comm'n of Texas v.*

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147 TSE Ex. 3 & TSE Brief at 29.

148 TSE Ex. 1, 40; TR 132:11-133:21; 137:19-138:7.

149 TSE Ex. 3.

150 *See*, TEX. UTIL. CODE ANN. § 101.102.

151 TEX. UTIL. CODE ANN. § 104.103.

152 Division Brief at 18.

153 *Railroad Comm'n of Texas v. Moran Util. Co.*, 728 S.W.2d 764 (Tex. 1987) (*Moran*). The underlying facts in *Moran* occurred in 1976. GURA had not been enacted. However, the substantive provisions of GURA were enacted in 1975 as part of PURA. *See*, Public Utility Regulatory Act, 64th Leg.,R.S.ch. 721, 1975 Tex. Gen. Laws 2327.

Moran Util. Co. (*Moran*) a utility increased its flat rate from $2.06 per MCF of gas to $2.46 per MCF without filing a statement of intent with the Commission.[154] Three years later the utility filed a statement of intent to increase rates from $2.46 to $2.90 per MCF. The Commission authorized the utility to increase its rates to $2.90 per MCF. Nevertheless, the Commission ordered the utility to pay a refund for the rates charged during the intervening three years when the utility charged $2.46 per MCF.[155] The utility appealed the order and the trial court affirmed the Commission decision.[156] However, the court of appeals reversed and remanded the order.[157]

On appeal, the Supreme Court of Texas reversed the appellate court and reinstated the Commission order.[158] In analyzing the rate provisions of PURA, the Supreme Court held that a rate change is *illegal* if instituted before the requirements of PURA are satisfied[159]. The Court went on to hold that a refund is appropriate even if the legally established rate is less than the reasonable value of its gas:

> PURA established the conditions and procedures that a utility must comply with before it can change its rates. (cites omitted) A rate change is *illegal* if instituted before these requirements are satisfied . . . . [U]ntil a utility complies with PURA's requirements, it is prohibited from charging more than the legally established rate even if the reasonable value of its gas exceeds the legal value of that gas.[160]

TSE is incorrect in stating that requiring a refund is the equivalent of assessing a penalty in this case. The penalty provisions for a violation of GURA are delineated in Chapter 105, of the Texas Utilities Code.[161] Under those provisions the RRC may seek civil penalties for any act in violation of GURA, or an order or rule of the Commission.[162] A civil penalty under that section may be assessed in an amount not less than $1,000, nor more than $5,000, for each violation.[163] Each day

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[154] *Id* at 765.

[155] *Id* at 766.

[156] *Id* at 767.

[157] *Id*.

[158] *Id*.

[159] *Id* at 768.

[160] *Id* (emphasis in original).

[161] TEX. UTIL CODE ANN. § 105.001-105.05, previously TEX. REV. CIV. STAT. ANN. art. 1446e, §§ 9.01-9.07.

[162] TEX. UTIL. CODE ANN. § 105.02, previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 10.03.

[163] TEX. UTIL. CODE ANN. § 105.023(b), previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 9.02(a).

of a continuing violation is considered a separate violation.[164]

This is not a case in which the Division seeks a penalty, despite TSE's repeated failure to file revised tariffs. The Division argues that a refund should be required because TSE was charging an unauthorized rate. While the Division and the Intervening Cities maintain that the rates were unauthorized solely because statement of intent were not filed, in fact, the rate were unauthorized because they were not rates reflected in the tariff on file with the RRC. Even when TSE did file a revised tariff, TSE failed to file a statement of intent as required. Statements of intent were required because the revised rates were increases over the prior authorized rate.

The Examiners recommend the Commission order that TSE refund $263,315 to the Cities. TSE should refund $85,692 to the city of Bellville, $82,103 to the city of Columbus, $44,234 to the city of Waller, and $51,286 to the city of Sealy. Unless a new rate is approved through the filing of a statement of intent, TSE should only charge the authorized rate reflected on a valid tariff filed with the Commission.

V. Conclusion

The Examiners recommend that TSE be required to pay refunds for charges made in excess of the authorized rate. The authorized rate is the rate reflected in the tariff on file with the Commission. Any time that a utility proposes a rate change to an equivalent or lower rate, a revised tariff must be filed with the Commission. Whenever a utility proposes a rate increase, a revised proposed tariff must be filed along with the statement of intent. At the time that TSE filed a revised tariff, two years after the first rate change in this case, TSE's revised tariff clearly reflected a rate increase. TSE did not file a statement of intent at that time.

TSE has argued that its intent and purpose in June of 1994, to derive an equivalent or lower rate, should control the outcome of this case. TSE claims that, since TSE did not intend a rate increase, no statement of intent was required. The Commission should reject TSE's argument in this case. The purpose of the proposed rate change should not be considered in a case where the utility has not complied with the minimum statutory requirements. In addition, a rate change should be measured against the legally authorized rate. Thus, in November of 1996, when TSE finally filed a revised tariff, TSE should have filed a statement of intent. Clearly, the rate reflected in the revised tariff was an increase over the prior authorized rate.

The Examiners recommend that TSE refund $263,315 to the Cities. TSE should refund $85,692 to the city of Bellville, $82,103 to the city of Columbus, $44,234 to the city of Waller, and

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[164] TEX. UTIL. CODE ANN. § 105.023(c), previously TEX. REV. CIV. STAT. ANN. art. 1446e, § 9.02(b). In the context of civil enforcement a minimum penalty represents a mandatory penalty for each day of violation. *State v. City of Greenville*, 726 S.W.2d 162, 170 (Tex. App. Dallas 1986, writ ref. n.r.e).

$51,286 to the city of Sealy. The Examiners recommend that the Commission require TSE to charge Sealy and Waller the rate approved in *Complaint of the City of Sealy against Texas Southeastern Company*, G.U.D. No. 8752 and *Complaint of the City of Waller against Texas Southeastern Company*, G.U.D. No. 8754, respectively.[165] The Examiners recommend that TSE file conforming tariffs for the cities of Sealy and Waller. Finally, the Examiners recommend that the Commission reject the tariffs filed in November 1996 for the cities of Bellville and Columbus and that TSE be directed to charge those cities the authorized rate of IFHSC-index plus 61.5¢.

Respectfully submitted,

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Rate Analyst
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[165] *See*, Tex. RR. Comm'n, *Complaint of the City of Sealy against Texas Southeastern Company*, G.U.D. No. 8752 (Gas Utils.Div. April 13, 1999) (Final Order) and Comm'n, *Complaint of the City of Waller against Texas Southeastern Company*, G.U.D. No. 8754 (Gas Utils.Div. April 13, 1999) (Final Order).

RAILROAD COMMISSION OF TEXAS

TEXAS SOUTHEASTERN GAS	**§**	
COMPANY'S REQUEST FOR A	**§**	
FORMAL HEARING ON	**§**	**GAS UTILITIES DOCKET NO. 8784**
ALLEGED VIOLATION NUMBER 6	**§**	
OF AUDIT NUMBER 96-089	**§**	

PROPOSED ORDER

Notice of Open Meeting to consider this order was duly posted with the Secretary of State within the time period provided by law pursuant to Tex. Gov't Code Ann. Chapter 551 (Vernon 1999 & Supp. 2000).

This application was considered following notice and hearing by a hearings examiner and technical examiner. The examiners' Proposal for Decision contained proposed findings of fact and conclusions of law in accordance with 16 Tex. Admin. Code § 1.142 (West 1999). The Proposal for Decision and Order were properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record under 16 Tex. Admin. Code § 1.142 (West 1999).

The Railroad Commission of Texas, after review and due consideration of the Proposal for Decision and the proposed findings of fact and conclusions of law, adopts the following Findings of Fact and Conclusions of Law, and orders as follows:

FINDINGS OF FACT

Procedural History

1. On December 15, 1998, the Commission signed an Order of Dismissal in this matter and, on December 18, 1998, the parties were notified of that Order.

2. On January 4, 1999, the Cities of Brenham, Hempstead, Navasota, Sealy, Tomball, and Waller (Intervening Cities) filed a timely Motion for Rehearing and, on January 11, 1999, Texas Southwestern Gas Company (TSE) filed its reply to that motion.

3. On January 26, 1999, the Commission signed an order extending the time to rule on the Motion for Rehearing.

4. On March 9, 1999, the Commission signed an order granting the Intervening Cities' Motion for Rehearing and requiring TSE to file a statement of intent with respect to the rates TSE is currently charging the Intervening Cities; on March 12, 1999, the parties were notified of that Order.

5. On March 18, 1999, TSE filed a Motion for Rehearing and, on April 8, 1999, the Intervening Cities filed a reply to that Motion. On April 13, 1999, the Motion for Rehearing was granted

in the Second Order on Rehearing and the case was remanded for further proceedings; the parties were notified of that order on April 16, 1999.

6. On November 30, 1999 a hearing was held. Thereafter, a Motion to Reopen the record was granted and on January 29, 2000, the evidentiary record in this case was closed.

TSE's Gas Sales to Cities

7. TSE is the owner and operator of a gas transmission system in Texas.

8. The Cities of Bellville, Columbus, Waller, and Sealy (Audit Cities) are municipalities that own their respective gas distribution systems.

9. The Audit Cities' gas distribution systems are municipally-owned gas utilities engaged in distributing gas to the public.

10. The Gas Services Division conducted an audit of TSE's rates, Audit 96-089, in 1996; the audit was completed October 1996 and covered the period from January 1, 1994 through July 31, 1996.

11. TSE was the sole supplier of natural gas to the Audit Cities for distribution and resale through the local distribution system of each city from January 1, 1994 through July 31, 1998.

12. TSE transports in its pipeline systems, in areas outside the municipal boundaries of each of the Audit Cities, the gas which it owns and sells and delivers at each of the city gates.

13. TSE sold natural gas at the city gate to the Audit Cities from January 1, 1994 through July 31, 1998.

14. The rate set forth in TSE's filed tariff for the City of Bellville in July of 1994 was an AIP index-driven rate plus 44¢ per MMBtu ($Index_{AIP}$ + 44¢)/MMBtu.

15. The rate set forth in TSE's filed tariff for the City of Columbus in July of 1994 was an AIP index-driven rate plus 44¢ per MMBtu ($Index_{AIP}$ + 44¢)/MMBtu.

16. The rate set forth in TSE's filed tariff for the City of Waller in July of 1994 was an AIP index-driven rate plus 44¢ per MMBtu ($Index_{AIP}$ + 44¢)/MMBtu.

17. The rate set forth in TSE's filed tariff for the City of Sealy in July of 1994 was an EPI index-driven rate plus 64¢ per MMBtu ($Index_{EPI}$ + 64¢)/MMBtu.

18. From June 1994 through May 1995, TSE charged the City of Bellville $2.85/MMBtu.

19. From June 1994 through May 1995, TSE charged the City of Columbus $2.85/MMBtu.

20. From June 1994 through May 1995, TSE charged the City of Waller $2.85/MMBtu

21. From June 1994 through May 1995, TSE charged the City of Sealy $2.75/MMBtu.

22. TSE did not file revised tariffs for the rates it charged Bellville, Columbus, Sealy, and Waller from June 1994 through May 1995.

23. TSE charged the City of Bellville $48,172 in excess of its tariffed rate from June 1994 through May 1995.

24. TSE charged the City of Columbus $51,163 in excess of it's tariffed rate from June 1994 through May 1995.

25. TSE charged the City of Waller $41,010 in excess of the rate set forth in its properly filed tariff from June 1994 through May 1995.

26. TSE charged the City of Sealy $51,286 in excess of the rate set forth in its properly filed tariff from June 1994 through May 1995.

27. The rate set forth in TSE's filed tariff for the City of Bellville in July of 1995 was an AIP index-driven rate plus 44¢ per MMBtu ($Index_{AIP}$ + 44¢)/MMBtu.

28. The rate set forth in TSE's filed tariff for the City of Columbus in July of 1995 was an AIP index-driven rate plus 44¢ per MMBtu ($Index_{AIP}$ + 44¢)/MMBtu.

29. The rate set forth in TSE's filed tariff for the City of Waller in July of 1995 was an AIP index-driven rate plus 44¢ per MMBtu ($Index_{AIP}$ + 44¢)/MMBtu.

30. From June 1995 through May 1996 TSE charged the City of Bellville $2.55/MMBtu.

31. From June 1995 through May 1996 TSE charged the City of Columbus $2.60/MMBtu.

32. From June 1995 through May 1996 TSE charged the City of Waller $2.55/MMBtu.

33. TSE did not file revised tariffs for the rates it charged Bellville, Columbus, and Waller from June 1995 through May 1996.

34. TSE charged the City of Columbus $3,186 in excess of it's tariffed rate from June 1995 through May 1996.

35. TSE charged the City of Waller $31.00 in excess of its tariffed rate from June 1995 through May 1996.

36. The AIP index ceased being published in December of 1995.

37. IFHSC plus 61.5¢ is an equivalent rate formula to AIP index plus 44¢.

38. The rate set forth in TSE's filed tariff for the City of Bellville in July of 1996 was an IFHSC index-driven rate plus 61.5¢ per MMBtu, ($Index_{IFHSC}$ + 61.5¢)/MMBtu.

39. The rate set forth in TSE's filed tariff for the City of Columbus in July of 1996 was an IFHSC index-driven rate plus 61.5¢ per MMBtu, ($Index_{IFHSC}$ + 61.5¢)/MMBtu.

40. The rate set forth in TSE's filed tariff for the City of Waller in July of 1996 was an IFHSC index-driven rate plus 61.5¢ per MMBtu, ($Index_{IFHSC}$ + 61.5¢)/MMBtu.

41. From June 1996 through May 1997 TSE charged the City of Bellville an IFHSC index-driven rate plus 74¢, ($Index_{IFHSC}$ + 74¢)/MMBtu.

42. From June 1996 through May 1997 TSE charged the City of Columbus an IFHSC index-driven rate plus 74¢, ($Index_{IFHSC}$ + 74¢)/MMBtu.

43. From June 1996 through May 1997 TSE charged the City of Waller an IFHSC index-driven rate plus 74¢, ($Index_{IFHSC}$ + 74¢)/MMBtu..

44. TSE filed a revised tariff for the Audit Cities in November of 1996.

45. The revised tariff indicated that TSE would charge IFHSC index-driven rate plus 74¢, ($Index_{IFHSC}$ + 74¢)/MMBtu.

46. The rate on the November 1996 tariff filed by TSE was an increase over the rate on the prior filed tariff, IFHSC index-driven rate plus 61.5¢ per MMBtu, ($Index_{IFHSC}$ + 61.5¢)/MMBtu.

47. TSE charged the City of Bellville $10,001 in excess of its tariffed rate from June 1996 through May 1997.

48. TSE charged the City of Columbus $13,180 in excess of its tariffed rate from June 1996 through May 1997.

49. TSE charged the City of Waller $3,193 in excess of its tariffed rate from June 1996 through May 1997.

50. TSE charged the City of Bellville $29,074 in excess of its tariffed rate from June 1997 through May 1998.

51. TSE charged the City of Columbus $14,574 in excess of its tariffed rate from June 1997 through May 1998.

CONCLUSIONS OF LAW

1. TSE is a gas utility as that term is defined in the Gas Utility Regulatory Act (GURA). TEX. UTIL. CODE ANN. § 101.003(7) (Vernon 1998 & Supp. 2000).

2. A gas utility shall file with each regulatory authority schedules showing all rates that are subject to the regulatory authority's original or appellate jurisdiction and in effect for a gas utility service, product, or commodity offered by the gas utility. TEX. UTIL. CODE ANN. § 102.151(a) (Vernon 1998 & Supp. 2000).

3. A gas utility may not directly or indirectly charge, demand, collect or receive a greater or lesser compensation for a service provided or to be provided by the utility than the compensation prescribed by the schedules. TEX. UTIL. CODE ANN. §104.005(a).

4. A rate change is illegal until a utility complies with the requirements of the Texas Utilities Code. *Railroad Comm'n of Texas v. Moran Util. Co.*, 728 S.W.2d 764 (Tex. 1987).

5. An increase in rates for gas utility services charged by a gas utility to a municipally-owned gas utility and delivered at the city gate of such municipally-owned utility is an increase in rates subject to the statement of intent requirement of GURA. TEX. UTIL. CODE ANN. § 104.102.

6. The authorized rate, as set forth in TSE's tariffs on file for the Cities of Bellville, Columbus and Sealy in June of 1994, was an AIP index-driven rate plus 44¢ per MMBtu ($Index_{AIP}$ + 44¢)/MMBtu; for the City of Sealy, the authorized rate was an EPI index-driven rate plus 64¢ per MMBtu ($Index_{AIP}$ + 64¢)/MMBtu.

7. By changing rates charged to the Audit Cities in June of 1994 without filing revised schedules or tariffs, TSE failed to meet its statutory duty to file such revised schedules as required by TEX. UTIL. CODE ANN. § 102.151(a) (Vernon 1998 & Supp. 2000) and 16 TEX. ADMIN. CODE § 7.44(c).

8. The authorized rate, as set forth in TSE's tariffs on file for the Cities of Bellville, Columbus and Sealy in June of 1995, was an AIP index-driven rate plus 44¢ per MMBtu ($Index_{AIP}$ + 44¢)/MMBtu.

9. By changing rates charged to the Cities of Belville, Columbus, and Waller, in June of 1995 without filing revised schedules or tariffs, TSE failed to meet its statutory duty to file such revised schedules as required by TEX. UTIL. CODE ANN. § 102.151(a) (Vernon 1998 & Supp. 2000) and 16 TEX. ADMIN. CODE § 7.44(c).

10. The authorized rate, as set forth in TSE's tariffs on file for the Cities of Bellville, Columbus and Sealy in June of 1996, was an AIP index-driven rate plus 44¢ per MMBtu ($Index_{AIP}$ + 44¢)/MMBtu.

11. In addition to the tariff filed in November of 1996, TSE was required to file a statement of intent because the tariff contained a proposed increase in rates. TEX. UTIL. CODE ANN. § 104.102.

12. By changing rates charged to the Cities of Belville, Columbus, and Waller, in June of 1994 without filing revised schedules or tariffs, and by charging increased rates without filing a statement of intent, TSE failed to meet its statutory duty to file such revised schedules and statements of intent as required by Tex. Util. Code Ann. § 102.151(a), 104.102 (Vernon 1998 & Supp. 2000) and 16 TEX. ADMIN. CODE § 7.44(c).

13. From June of 1994 through May of 1998, TSE charged the Audit Cities in excess of the authorized rates in the following amounts:
    a. Bellville - $85,692.00;
    b. Columbus - $82,103.00;
    c. Waller - $44,234.00; and
    d. Sealy - $51,286.00.

IT IS THEREFORE ORDERED BY THE RAILROAD COMMISSION OF TEXAS that no later than 30 days from the date this order is issued TSE shall refund $85,692 to the city of Bellville, $82,103 to the City of Columbus, $44,234 to the City of Waller, and $51,286 to the City of Sealy. **IT IS FURTHER ORDERED** that TSE shall include interest on all refund payments at the rate of six percent per annum from the date of each overcharge until paid and that TSE shall submit documentation of all refund payments to the Audit Section of the Commission's Gas Services Division within 60 days of the date of this order.

IT IF FURTHER ORDERED that the tariffs filed by TSE in November of 1996 be rejected and that TSE be **ORDERED** to charge the Cities of Bellville and Columbus the equivalent of the rates on file with the Commission in June of 1994, i.e., IFHSC plus 61.5¢. The rates to be charged by TSE to the Cities of Sealy and Waller were previously set by order of this Commission in GUD Docket Nos. 8752 & 8754.

IT IS FURTHER ORDERED that all proposed findings of fact and conclusions of law not specifically adopted herein are **DENIED**.

Signed this _____ day of _____, 2000.

RAILROAD COMMISSION OF TEXAS

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MICHAEL L. WILLIAMS
CHAIRMAN

_____

CHARLES R. MATTHEWS
COMMISSIONER

_____

TONY GARZA
COMMISSIONER

ATTEST:

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SECRETARY